Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BRUCE RICHARD TOSKI,

Petitioner,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY and
KENDALL G. WILLIAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DONALD A. BLACKWELL
(Counsel of Record)
ANANIA, BANDKLAYDER
& BLACKWELL
100 S.E. Second Street
Suite 3300
Miami, Florida 33131
(305) 373-4900
Counsel for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

20 pp

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW[1]

Bruce Richard Toski – Plaintiff/Appellant/Petitioner

William J. McDonnell – Defendant/Appellee/Respondent

Jefferson H. Henry – Defendant/Appellee/Respondent

Kendall G. Williams – Defendant/Appellee/Respondent

---

[1] Hereinafter, all references to the parties will be abbreviated as follows: BRUCE RICHARD TOSKI ("Petitioner" or "TOSKI"); WILLIAM J. McDONNELL ("McDONNELL"), JEFFERSON H. HENRY ("HENRY"); and KENDALL G. WILLIAMS ("WILLIAMS") (collectively "Respondents").

TABLE OF CONTENTS

Parties To The Proceedings In The Court Below i

Table of Authorities iii

Official and Unofficial Reports And Opinions Delivered In The Case. vi

Jurisdictional Statement 1

Statement Of The Case 1

Statement of Facts 1

Statement of Proceedings 2

Reasons For Denying The Writ 5

I. This Court Should Not Grant A Writ Of Certiorari To Consider An Issue Which The Petitioner Did Not Properly Preserve, Where Three Federal Courts Already Have Reviewed Petitioner's Claims And, At Various Times, Concluded That They Are "Meritless" And That Petitioner's Appeal Is Frivolous 5

II. The Grant Of A Writ Of Certioari Would Be Futile Because The Preemption Issue, Which Is The Sole Basis For Petitioner's Appeal, Is Only One Of A Number Of Independent Grounds, Which, Individually And Collectively, Are Sufficient To Support The Decisions Of The District Court And The Court Of Appeals 10

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 9

Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) 9

Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978) 9

Auer v. Robbins, ___ U.S. ___, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) 9

Bennett v. Spear, ___ U.S. ___, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) 10

Connor v. Finch, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) 9

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) 11

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 8

Dothard v. Rawlinson, 438 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) 9

Duignan v. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927) 6

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) 10, 12

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) 7

Cases, continued:

Page

Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590, *reh'g denied*, 467 U.S. 1268, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984) 8

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) 9

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940) 6, 12

Mills v. Singletary, 63 F.3d 999, *reh'g, en banc, denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1834, 134 L.Ed.2d 940 (1996) 7

Nagle v. Alspach, 8 F.3d 141 (3d Cir. 1993), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994) 11, 12

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) 5, 6, 12

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012, *reh'g denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982) 8

United States v. Alvarez-Sanchez, 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994) 6

United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936) 10

United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) 9

Cases, continued: Page

United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) 11

Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740, *reh'g denied*, 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979) 11

Yee v. Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 6, 11

Statutes:

28 U.S.C. §1254 (1988) 1

28 U.S.C. §1331 (1980) 3

28 U.S.C. §2101 (1888) 1

Rules:

Supreme Court Rule 10. 1

Supreme Court Rule 14. 11

Supreme Court Rule 15. 1

11th Cir.R. 28, I.O.P. - 6 8

OFFICIAL AND UNOFFICIAL REPORTS AND OPINIONS DELIVERED IN THE CASE

United States' Magistrate Judge Turnoff's November 9, 1993 Report and Recommendation on Defendants' Motion for Summary Judgment .....App.[2] 67-75a

United States District Judge Davis' January 31, 1994 Order Adopting Magistrate's Report and Recommendation..... App. 21a

United States Court of Appeals' December 10, 1996 Order (*per curiam*).....App. 25-26a

United States Court of Appeals' February 26, 1997 Order on Petition(s) for Rehearing and Suggestion(s) of Rehearing *En Banc* (*per curiam*) ..... App. 37a

United States District Judge Davis' March 9, 1994 Order Denying Motion to Appeal *in Forma Pauperis*.....R. App. 1-2a

---

[2]Hereinafter, all references to the Appendix to the Petition for a Writ of Certiorari and specific pages therein will be abbreviated as "App. ___ ." All references to the Appendix to the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari and specific pages therein will be abbreviated as "R. App. ___."

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review, by Petition for Writ of Certiorari, the judgment of the United States Court of Appeals affirming the United States District Court's grant of summary judgment for Respondents,[3] pursuant to 28 U.S.C. §§1254(1) & 2102(c) (1988) and Rule 10(a) of the Supreme Court Rules.

STATEMENT OF THE CASE

I. Statement of Facts[4]

On or about June 21, 1976, Eastern Air Lines, Inc. ("EAL") hired TOSKI to work as a shop laborer at its Miami facility. *See* June 20, 1996 Brief of Appellees/ Respondents in the United States Court of Appeals ("Respondents' Brief") at R. App. 122a. Five (5) years later, EAL promoted TOSKI to the position of mechanic in its Ground Support Equipment Auto Shop ("GSE Shop"). *Id.* TOSKI remained in the GSE Shop for approximately six (6) weeks, when, as part of a reduction in its work force, EAL laid TOSKI off and reassigned him to a stock clerk position. *Id.* On April 24, 1984, EAL recalled TOSKI to the GSE Shop as a line mechanic. *Id.*

Throughout the next 2½ years, TOSKI's supervisors, who, at various times, included each of the Respondents, repeatedly experienced problems with TOSKI's job per-

---

[3] App. 25-26a.

[4] The "Statement of the Case" section of TOSKI's Petition, pp. 2-3, is inaccurate, misleading and unsupported by the record in this case. Accordingly, in furtherance of their obligations under Rule 15.2 of the Supreme Court Rules, Respondents are compelled to correct TOSKI's misstatements of the record.

formance and attitude, including: (1) TOSKI's propensity for performing unnecessary and/or unauthorized work on company vehicles; (2) his repeated violations of EAL's rules and regulations; and (3) his failure to obey the instructions and directives of EAL management personnel. *Id.* at R. App. 123a.

Then, on November 7, 1986, Respondents McDONNELL and WILLIAMS determined that TOSKI had falsified a claim for medical benefits in conjunction with an incident that allegedly occurred between TOSKI and Respondent McDONNELL on October 24, 1986. *Id.* Respondents McDONNELL and WILLIAMS, in turn, reported TOSKI's actions to the appropriate EAL Labor Relations personnel and, on November 7, 1986, EAL terminated TOSKI'S employment. *Id.*

Five (5) days later, TOSKI filled out a grievance form relating to his termination. *Id.* [5] Significantly, however, TOSKI made a conscious decision not to pursue or, in the alternative, to delay his pursuit of that grievance before the System Board of Adjustment ("SBA"). *Id.* at R. App. 124a & 128-129a n. 20. As a result, the SBA never even considered, let alone issued a ruling on, TOSKI's grievance. *Id.*

II. Statement of Proceedings

In 1987, TOSKI filed suit against EAL, WILLIAMS, McDONNELL and others for injunctive relief and damages he allegedly sustained as a result of EAL'S decision to terminate his employment. *See* TOSKI's Complaint

---

[5] Articles 17 through 19 of the Collective Bargaining Agreement between EAL and TOSKI's union, the IAMAW ("CBA"), indisputably governed the filing, prosecution and resolution of such grievances.

in *Toski v. Lorenzo, et al.*, Case No. 87-1422-CIV-ATKINS, at R. App. 167-180a. In that case, United States District Judge Atkins dismissed TOSKI's Complaint, based upon his findings that: (1) TOSKI had not exhausted his administrative remedies; and (2) TOSKI's claims were subject to compulsory arbitration. *See* Order on Application for Temporary Restraining Order, dated August 19, 1987, at R. App. 181-182a. Eighteen (18) months later, EAL filed a Chapter 11 Bankruptcy Petition, which resulted in a stay of TOSKI's action against EAL. *See* EAL's March 9, 1989 Certificate of Commencement of Case at R. App. 183a.

Unable to obtain relief against his employer (i.e., EAL) and in a thinly veiled attempt to circumvent the operation of the automatic stay, TOSKI then initiated this action against Respondents, individually, on October 23, 1990, in Florida state court. *See* Complaint at App. 1-20a. Respondents moved to dismiss or strike the Complaint and timely removed the case to the United States District Court for the Southern District of Florida ("district court"), based on federal question jurisdiction and pursuant to 28 U.S.C. §1331 (1980). *See* Respondents' Brief at R. App. 117a.

Respondents later answered the Complaint and, at the close of discovery, filed a Motion for Summary Final Judgment. In support of their Motion, Respondents asserted numerous independently dispositive grounds. *See* Respondents' August 17, 1993 Motion for Summary Final Judgment and Supporting Memorandum of Law ("Respondents' Motion for Summary Judgment") at R. App. 9-29a. Magistrate Judge William C. Turnoff, in turn, recommended that the district court grant Respondents' Motion. *See* Report and Recommendation, dated November 10, 1993, at App. 67-75a. In making his recommenda-

tion, Magistrate Judge Turnoff rejected TOSKI's contention that he did not fail to exhaust his administrative remedies, which was the sole basis of TOSKI's response to Respondents' arguments.[6] *See* Petitioner's November 11, 1993 Response to Respondents' Motion for Summary Judgment at R. App. 36-38a.

On February 1, 1994, District Judge Davis adopted Magistrate Judge Turnoff's Report and Recommendation "in its entirety" and granted Summary Final Judgment in favor of Respondents. *See* Order Adopting Magistrate's Report & Recommendation at App. 21a. On March 1, 1994, TOSKI appealed the Summary Final Judgment to the United States Court of Appeals for the Eleventh Circuit. *See* Petitioner's Notice of Appeal at App. 23a. In connection therewith, TOSKI filed a Motion to Proceed on Appeal *In Forma Pauperis* and a supporting Affidavit. Judge Davis denied TOSKI's Motion in a March 9, 1994 Order, because, from an objective standard, TOSKI's appeal was frivolous, i.e., there was "no demonstration that the issues central to the appeal are debatable."[7] *See* Order Denying Motion to Appeal *In Forma Pauperis* at R. App. 1-2a.

---

[6]Magistrate Judge Turnoff did not address many of the arguments proffered by Respondents in their Motion for Summary Judgment with respect to the viability of TOSKI's state law claims, because he found those claims were preempted. App. 70-74a.

[7]The Eleventh Circuit denied TOSKI's April 11, 1992 Rule 24 Motion for Leave to Appeal *In Forma Pauperis* on July 7, 1994, on the grounds that TOSKI did not appear to be indigent. It later denied TOSKI's Motion for Reconsideration of the July 7, 1994 Order. On March 20, 1995, this Court denied TOSKI's December 20, 1994 Motion for Leave to Proceed *In Forma Pauperis* in the Supreme Court, Case No. 94-7524, for purposes of filing a Petition for Writ of Certiorari to review the lower courts' Orders denying TOSKI leave to appeal *in forma pauperis* in the Eleventh Circuit. R. App. 166a.

After conducting a *de novo* review of the record and construing the evidence in a light most favorable to TOSKI, the Court of Appeals concluded that "each of the arguments TOSKI makes concerning his procedural challenges to various orders of the district court and his arguments relative to the district court's grant of summary judgment for the defendants are meritless." Court of Appeals' December 10, 1996 Judgment at App. 25-26a. Accordingly, in a *per curiam* opinion, the Court affirmed the district court's grant of summary judgment in favor of the Respondents and against TOSKI. *Id.* Thereafter, TOSKI filed a Suggestion of Rehearing *En Banc* in which he argued, for the first time, that his state law claims were not pre-empted "by failure to exhaust any administrative remedy or the RLA." Petitioner's Suggestion of Rehearing *En Banc* at App. 27-36a. On February 26, 1997, the Court of Appeals summarily denied TOSKI's Suggestion and the instant appeal followed. *See* Order on Petition(s) for Reconsideration and Suggestion(s) of Rehearing *En Banc* at App. 37a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO CONSIDER AN ISSUE WHICH THE PETITIONER DID NOT PROPERLY PRESERVE, WHERE THREE FEDERAL COURTS ALREADY HAVE REVIEWED PETITIONER'S CLAIMS AND, AT VARIOUS TIMES, CONCLUDED THAT THEY ARE "MERITLESS" AND THAT PETITIONER'S APPEAL IS FRIVOLOUS.

It is axiomatic that this is "a court of review, not one of first view." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 457, 115 S. Ct. 2214, 2219, 132 L.Ed.2d 400, 408 (1995) (declining to review an issue

not presented in the courts of first and second instance); *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996, 1000 (1927) ("This court sits as a court of review").

Thus, the Court repeatedly has held that it will not grant certiorari to consider issues and arguments that were not presented to the district court or the court of appeals, absent the most exceptional circumstances. *Oklahoma Tax Comm'n,* 515 U.S. at 457, 115 S.Ct. at 2219, 132 L.Ed.2d at 408 (citing *Yee v. Escondido,* 503 U.S. 519, 535, 112 S.Ct. 1522, 1533, 118 L.Ed.2d 153, 170 (1992) (citation omitted)). *See United States v. Alvarez-Sanchez,* 511 U.S. 350, 360 n. 5, 114 S.Ct. 1599, 1605 n. 5, 128 L.Ed.2d 319, 329 n. 5 (1994) ("Finding no exceptional circumstances . . . we adhere to our general practice and decline to address [an argument which was not raised in the District Court or the Court of Appeals] "); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed.2d 849, 851 (1940) ("it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (citing *Duignan,* 274 U.S. at 200, 47 S.Ct. at 568, 71 L.Ed. at 1000)).

A review of the record conclusively demonstrates that, in the district court, Petitioner did not assert the argument which forms the sole basis for the Question Presented for Review. *See* Petitioner's October 12, 1993 Response to Respondents' Motion for Summary Judgment at R. App. 36-38a; Petitioner's November 23, 1993 Objections to Magistrate Judge Turnoff's Report and Recommendation at R. App. 53-59a; Report and Recom-

mendation, dated November 9, 1993, at App. 73a (wherein Magistrate Judge Turnoff notes that "Defendants contend that RLA preemption, coupled with Plaintiff's failure to exhaust his administrative remedies, entitles them to summary judgment on each of these separate claims as well. Plaintiff's only response to this argument is that he did not fail to exhaust, which argument has now been rejected").

Moreover, TOSKI did not properly raise the argument that his state law claims were not preempted by the RLA in his initial brief in the Eleventh Circuit.[8] *See* April 15, 1996 Initial Brief of Appellant/Petitioner in the United States Court of Appeals ("Petitioner's Brief") at R. App. 78-86a. *See also* Respondents' Brief at R. App. 127-135a. In fact, it was not until after the Eleventh Circuit completed its *de novo* review of the District Court's grant of summary judgment in Respondents' favor and concluded that "[TOSKI's] arguments relative to the district court's grant of summary judgment in favor of the Defendants are meritless,"[9] that Petitioner first raised the issue framed in his Question Presented for Review.[10] Peti-

---

[8]It is hornbook law that, even if the Petitioner had raised this new argument in the Court of Appeals, that court would not have considered it. *Mills v. Singletary*, 63 F.3d 999, 1008 n.11 ("arguments not presented in the district court will not be considered for the first time on appeal"), *reh'g, en banc, denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1834, 134 L.Ed.2d 940 (1996) (citations omitted).

[9]*See* Court of Appeals' December 10, 1996 Judgment at App. 25-26a.

[10]Although Petitioner previously had cited *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), as "supplemental authority," in the Reply Brief he filed in the Eleventh Circuit, he did not, nor under the applicable Rules he was permitted to rely on *Norris* as "supplemental auth-

[footnote continued]

tioner did so in a Suggestion for Rehearing *En Banc,*[11] which the Eleventh Circuit, in turn, summarily denied *per curiam. See* Order on Petition(s) for Reconsideration and Suggestion(s) of Rehearing *En Banc* at App. 37a.

Accordingly, Petitioner did not present to the lower courts, let alone properly preserve, the issue which forms the sole basis for his Question Presented. *See Hoover v. Ronwin,* 466 U.S. 558, 574 n. 25, 104 S.Ct. 1989, 1998 n. 25, 80 L.Ed.2d 590, 603 n. 25, *reh'g denied,* 467 U.S. 1268, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984) ("We also do not address Ronwin's contention . . . made . . . for the first time in his response to petitioners' motion for rehearing in the Court of Appeals [because] [h]is failure to raise this issue in a timely manner precludes our consideration"); *Rogers v. Lodge,* 458 U.S. 613, 628 n. 10, 102 S.Ct. 3272, 3281 n. 10, 73 L.Ed.2d 1012, 1025 n. 10, *reh'g denied,* 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982) (refusing to consider appellants' contention which was not properly raised in or addressed by the Court of Appeals); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287, 298 (1981) (affirming the judgment of the court of appeals on the grounds that the question presented in the petition for certiorari was not raised in the court of appeals).

---

ority" because: (a) the June 20, 1994 *Norris* opinion did not constitute an intervening decision or a new development, because Petitioner served his initial brief in the Eleventh Circuit on April 15, 1996; and (b) the decision was not relevant to any issue properly presented to the Eleventh Circuit in Petitioner's appeal. *See* Petitioner's Brief at R. App. 78-86a; Respondents' Brief at R. App. 127-135a; *supra* p. 7 n. 8. *See also* 11th Cir.R. 28, I.O.P. - 6, at R. App. 3a.

[11] App. 27-36a.

Consequently, absent a showing of "exceptional circumstances," this Court should not consider that argument on a Petition for a Writ of Certiorari. *See Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 912, 137 L.Ed.2d 79, 92 (1997) (wherein the Court refused to consider a petitioner's argument which was inadequately preserved in the proceedings below) (citing *Adickes v. S.H.Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S.Ct. 1598, 1602 n. 2, 26 L.Ed.2d 142, 148 n. 2 (1970)); *Dothard v. Rawlinson*, 438 U.S. 321, 323 n. 1, 97 S.Ct. 2720, 2724 n. 1, 53 L.Ed.2d 786, 794 n. 1 (1977) (rejecting appellants' argument on the ground that, "[n]ot having been raised in the District Court, that issue is not before us"); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2588, 2589, 45 L.Ed.2d 623, 630 (1975) (declining to consider issue not raised in the appellate brief filed in the Court of Appeals).

Moreover, this case is far from "exceptional." The cases this Court considers "exceptional" involve questions of subject matter jurisdiction,[12] the finality and appealability of a judgment,[13] a state's Eleventh Amendment immunity from suit,[14] and issues that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Connor v. Finch*, 431 U.S. 407, 421 n. 19, 97 S.Ct. 1828, 1837 n. 19, 52 L.Ed.2d 465, 478 n. 19 (1977) (wherein the Court held that the constitutional validity of a court-ordered reapportionment of the

---

[12] *See, e.g., Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978).

[13] *See, e.g., Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976).

[14] *See, e.g., Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

Mississippi House of Representatives was an "exceptional" circumstance meriting review in the absence of the parties raising the issue below) (quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555, 557 (1936)).

Here, in contrast, both the District Court and the Court of Appeals independently have concluded that the Petitioner's procedural and substantive claims are frivolous and meritless. *See* Court of Appeals' December 10, 1996 Judgment at App. 25-26a (wherein the Court of Appeals held that the arguments advanced in Petitioner's appeal were "meritless"); March 9, 1994 Order Denying Motion to Appeal *in Forma Pauperis* at R. App. at 1-2a (wherein District Judge Davis denied Petitioner's Motion because TOSKI's appeal is frivolous). Because this action is not "exceptional," this Court should deny TOSKI's Petition for a Writ of Certiorari.

II. THE GRANT OF A WRIT OF CERTIORARI WOULD BE FUTILE BECAUSE THE PREEMPTION ISSUE, WHICH IS THE SOLE BASIS FOR PETITIONER'S APPEAL, IS ONLY ONE OF A NUMBER OF INDEPENDENT GROUNDS, WHICH, INDIVIDUALLY AND COLLECTIVELY, ARE SUFFICIENT TO SUPPORT THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS.

This Court has long recognized that a respondent may urge any ground asserted in the lower courts as a basis for affirming the decision of the Court of Appeals. *See Bennett v. Spear,* ___ U.S. ___ , 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281, 298 (1997) (holding that a respondent may defend the judgment on any ground raised below); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39, 109 S.Ct. 2782, 2788, 106 L.Ed.2d 26, 38-39 (1989) ("a

prevailing party may, of course, 'defend its judgment on any grounds properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals' ") (quoting *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740, 753 n. 20, *reh'g denied,* 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979)).

This rule applies with equal force regardless of the extent to which a petitioner seeks to limit or narrow the scope of an appeal in its question presented.[15] *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78, 115 S.Ct. 464, 473, 130 L.Ed.2d 372, 385 (1994) ("a prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below' ") (quoting *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851, 862 (1977)).

Thus, federal courts consistently have held that an appeal is "fore-ordained" to fail and, therefore, frivolous, where a petitioner challenges only one of several grounds upon which the lower courts based or properly could have based their judgment. *Nagle v. Alspach,* 8 F.3d 141, 143-44 (3d Cir. 1993) (affirming on the grounds that the appeal was frivolous, and "doomed to failure from the moment the plaintiff-appellant's brief was filed" because the appellant did not contest two of the four independent grounds upon which the district court based its judgment), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994).

---

[15] Conversely, Rule 14.1(a) provides that a petitioner is limited on a writ of certiorari to arguing the question presented, in order to allow, among other things, the respondent to sharpen its arguments as to why certiorari should not be granted. *See Yee,* 503 U.S. at 535-536, 112 S.Ct. at 1533, 118 L.Ed.2d at 170.

Here, TOSKI has asserted, as the sole basis for his Petition for a Writ of Certiorari, the question of whether the state law claims in his Complaint were preempted by the RLA. For the reasons set forth in Section I, TOSKI's assertion of that issue, for the first time, in this appeal, is fatal to his Petition. *See, e.g., Oklahoma Tax Comm'n,* 515 U.S. at 457, 115 S.Ct. at 2219, 132 L.Ed.2d at 408; *McGoldrick,* 309 U.S. at 434, 60 S.Ct. at 672, 84 L.Ed. at 851.

However, assuming *arguendo* that Toski previously had asserted and properly preserved the pre-emption issue for appeal, which he did not, it would not alter his lack of entitlement to certiorari review because he has not challenged the myriad of independent grounds that Respondents asserted in support of their Motion for Summary Judgment, which collectively are sufficient to support the District Court's grant of summary judgment. *See* Respondents' Motion for Summary Judgment at R. App. 4-31a; Respondents' Brief at R. App. 135-154a. *See also Granfinanciera, S.A.,* 492 U.S. at 38-39, 109 S.Ct. at 2788, 106 L.Ed.2d at 38-39. Accordingly, TOSKI's appeal is "doomed to failure" and his Petition for Writ of Certiorari should be denied. *Nagle,* 8 F.3d at 143-144.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD A. BLACKWELL
ANANIA, BANDKLAYDER
& BLACKWELL
100 S.E. Second Street
Suite 3300
Miami, Florida 33131
Phone: (305) 373-4900
Fax: (305) 373-6914
Counsel for Respondents.

October 6, 1997